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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 119

KATHLEEN B. NASH DURANT,

Petitioner

vs.

HELEN HIRONIMUS, WARDEN, FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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SUPREME COURT OF THE UNITED STATES

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HELEN HIRONIMUS, WARDEN, FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Supreme Court of the United States:

The petitioner, Kathleen B. Nash Durant, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above cause on the 4th day of May, 1948, reversing the order of the District Court of the United States for the Southern District of West Virginia, of September 4, 1947, discharging the petitioner from custody pursuant to a writ of habeas corpus.

Opinion Below

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 378) has not yet been of-

ficially published. The opinion of the District Court of the United States for the Southern District of West Virginia is reported in 73 F. Sup. 79.

Jurisdiction

The judgment of the United States Circuit Court of Appeals for the Fourth Circuit was entered on May 4, 1948 (R. 378). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

1. Did the Circuit Court of Appeals fail to give due effect to the findings of the District Court?

2. Is an officer of the Army of the United States while on terminal leave subject to recall by the Army to active duty for the sole purpose of being tried by Court Martial for offenses alleged to have been committed prior to being placed upon such leave, except with respect to offenses under Article of War 94 (not here involved)?

3. Is an officer of the Army of the United States while on terminal leave amenable to Court Martial jurisdiction for offenses alleged to have been committed prior to being placed upon terminal leave, except with respect to offenses under Article of War 94?

4. Is an officer of the Army of the United States on terminal leave on an active duty status?

5. Were petitioner's terminal leave orders effectively revoked? The District Court found that they were not. The Court of Appeals did not give effect to this finding.

6. Did petitioner's terminal leave orders by their self-executing terms in all events release her from active duty

not later than May 30, 1946, the date such terminal leave expired?

7. Are the provisions of Article of War 70 mandatory and was there such a compliance with this statute as to enable the Army to retain jurisdiction over the petitioner, even if such jurisdiction had attached theretofore?

8. Was there a denial of due process of law within the meaning of the Fifth Amendment to the Constitution of the United States as shown by uncontroverted facts in the court martial record pertaining to the arrest, detention and the subsequent extraction of a confession from petitioner?

9. Did a "Certificate of Service" and "Report of Separation" delivered to petitioner after the expiration date of her terminal leave found by the District Court not to have been delivered by mistake or lack of authority, terminate the active status of petitioner in the Army, and was the Court of Appeals justified in disregarding this finding?

Statement of the Case

Petitioner, a Captain in the Army of the United States, returned from the European theatre of operations on March 3, 1946, for separation from the service. She was sent to Camp Beale, California, a separation center, where on March 9, 1946, she was placed on terminal leave to expire May 30, 1946. At the time petitioner received her terminal leave orders she was given the first instalment of her mustering out pay of $300, amounting to $100 in cash. At this time her identification card was perforated with the word "inactive" and returned to her. She was also given an honorary service lapel button, and before leaving the center was required to attend one or two orientation lectures (R. 2). At this time also a Certificate of Service was signed by petitioner. The Certificate of

Service was dated May 30, 1946, and later was sent to petitioner and received by her on August 17, 1946. Petitioner then left Camp Beale and while on terminal leave in April, 1946, applied to WAC headquarters in Washington, D. C., seeking a return to active duty for assignment abroad and was informed that there was no opening for her, but that if one occurred she would be so advised. Petitioner's fiance returned to the United States and on May 28, 1946, they were married in Chicago (R. 3).

On May 24, 1946, one Lt. Banfill, who was concerned with "recall to active duty of officers" in the office of the Adjutant General, wrote certain orders directed to petitioner at 1409 Third Street, Hudson, Wisconsin, such orders purporting to revoke the unexecuted portion of terminal leave previously granted, and ordering petitioner to report to reception station No. 7 Fort Sheridan, Illinois, on May 29, 1946 (R. 3). Petitioner *did not* receive any copy of these orders prior to her arrest on June 3, 1946, and there was no evidence that they were received by any person listed as a proposed distributee thereof (R. 4, 13). On the same date Lt. Banfill sent a telegram to petitioner reciting that letter orders were being mailed "recalling you to active duty" effective 29 of May 1946, and assigning her to Fort Sheridan, Illinois. This telegram was received by petitioner on May 29, whereupon thinking it referred to her previous request for duty she replied by telegram stating that she did not desire further active duty and would await a reply (R. 4, 12). Thereafter on May 31, 1946, she sent a second telegram to Fort Sheridan, Illinois, stating that she could not understand the previous telegram recalling her to active duty, outlining her previous request for active duty and stating that she had been married in the interim and would go directly to Washington, D. C., to make an appeal for discharge to be effective (R. 4, 5). On June 2, 1946, petitioner telephoned Fort Sheridan and talked with three dif-

ferent people inquiring whether she should report there the following day. She was told by the person with whom she talked that nothing was known about it and that she should "come out tomorrow when there are others on duty" (R. 5).

At 2 o'clock a. m. June 3, 1946, and after the expiration of her terminal leave, petitioner was arrested in Chicago, Illinois, by military police. On the same morning she was questioned for several hours at the office of a private investigator. Before going to lunch at 1.30 p. m. she dictated a statement in the nature of a confession which was signed that evening. During that night she was confined in a psychopathic ward in the hospital at Fort Sheridan and on the following day was moved to a private room, and afterwards, on June 6, 1946, she signed a second confession. Both confessions were later used against her when she was tried by court martial. Charges were then served upon petitioner similar but not identical with the charges upon which she was later tried. These former charges, so far as the record shows, have never been dismissed nor have they been the subject of investigation under the 70th Article of War (R. 5).

Petitioner on June 17, 1946, was then transported to Germany where on August 8, 1946, she was served with the later charges. On August 10, an investigation of these charges was made pursuant to the 70th Article of War. No witnesses were examined, but statements of witnesses were read to petitioner. Petitioner requested the attendance of three witnesses, one being an Army sergeant who at that time was in the United States. The other two were the Princes Wolfgang and Philip von Hessen. These two German princes were at that time in Army custody at Darmstadt, a place of about 20 miles distant from where the investigation was being conducted. A telephone call by an Assistant Staff Judge Advocate to the officer in whose

custody the princes were resulted in information that they were "not available" (R. 6). They were, however, made "available" immediately prior to the 70th Article of War investigation for the benefit of the Army authorities and then afterwards were made available for the purpose of being witnesses for the prosecution at the court martial trial (R. 305-306).

Petitioner was then tried by court martial on August 22, 1946, and found guilty on most of the charges and sentenced to a term of five years in prison (R. 213-226). Conviction and sentence were confirmed by the Secretary of War and thereafter she engaged in serving the sentence.

Petitioner thereafter filed a petition for writ of habeas corpus in the United States District Court for the Southern District of West Virginia directed to the Warden of the Federal Reformatory in Alderson, West Virginia (R. 16-68).

After hearing on the writ the District Court ordered petitioner forthwith discharged conditioned upon furnishing recognizance with surety acceptable in the sum of $5,000 for her appearance to answer and abide by the judgment of the appellate proceedings (R. 99). Respondent thereafter moved for a new trial which the District Court denied (R. 113). Respondent then appealed to the United States Circuit Court of Appeals for the Fourth Circuit. That Court on May 4, 1948, reversed the decision of the District Court (R. 378). No rehearing was sought by petitioner. Petitioner then, in order to apply for a writ of certiorari, filed a motion with the Circuit Court of Appeals for a stay of the mandate for 30 days from June 3, 1948, which was granted.

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1. In holding that an officer of the Army of the United States on terminal leave is on an active duty status.

2. In holding that the terminal leave orders of petitioner were revoked by subsequent written orders which petitioner did not receive until after her terminal leave had expired, and, that she received notice of such revocation by a telegram from the War Department "recalling you to active duty" and saying that letter orders were being mailed.

3. In holding that the delivery to petitioner of a "Certificate of Service" and "Report of Separation" was not a formal, solemn act on the part of the Army and that such "Certificate" and "Report" did not separate petitioner from the Army and that it was issued in error.

4. In holding in effect that the findings of fact of the United States District Court for the Southern District of West Virginia were not entitled to their proper weight, and in substituting therefor certain findings of the Circuit Court of Appeals more specifically as follows:

(a) The District Court found as a fact that the written orders revoking the terminal leave of petitioner were never received by petitioner prior to her arrest and that such terminal leave orders were never effectively revoked; that the telegram to petitioner recalling her to active duty and her reply thereto gave her notice solely of the fact that the Army was then willing to comply with a previous request of petitioner that she be returned to active duty. The Circuit Court of Appeals erred in disregarding this finding and in holding that the telegram of May 29 to Ft. Sheridan "showed clearly that she was under no misconception as to the nature of her orders."

(b) The District Court held that there was no showing that the "Certificate of Service" and "Report of Separation" was issued by mistake or by an unauthorized person. The Circuit Court of Appeals erred in disregarding this holding and in holding that there was "evidence in abundance to show that the Certificate was forwarded to petitioner by mistake."

5. In failing to give due effect to the findings of the District Court based upon substantial evidence.

6. In holding that there had been adequate compliance by the Army with Article of War 70 resulting in the retention of court martial jurisdiction.

7. In holding that the petitioner was not deprived of her fundamental rights and due process of law guaranteed by the Fifth Amendment to the Constitution of the United States with respect to the facts involving her arrest, detention and the subsequent extraction of a confession from her.

Reasons for Granting the Writ

1. The determination of the true status of Army personnel on terminal or accrued leave is of very great importance because of (1) the large number of such personnel who may have been or may be subjected to recall for court martial trial; and (2) the large number of Army personnel who in the future may be confronted with the possibility of recall for court martial discipline.

2. The determination of the jurisdictional limitations of an Army court martial is of paramount importance since it is clear that the decision of the Circuit Court of Appeals permits the Army in certain factual situations to extend its jurisdiction to include the vast and increasing number of Army personnel in the various Army reserve corps.

3. The Circuit Court of Appeals has now rendered a decision in conflict with a decision of the Circuit Court of Appeals for the First Circuit in *Albert ex rel. Buice* v. *Patterson*, 155 F. (2d) 429, which held that the findings of fact made by a district court in a habeas corpus case cannot be set aside unless, giving due regard to the opportunity had by the trial court to judge the credibility of the witnesses, its finding is clearly erroneous. The Circuit Court of Appeals here in reviewing the evidence, both oral and documentary, adopted a rule of law in conflict with this opinion of the Circuit Court of Appeals for the First Circuit, and failed to give any weight to certain important and controlling findings of the District Court and substituted its own findings and conclusions without giving due regard to the opportunity had by the trial judge in the District Court to determine the credibility of the witnesses, when such findings of the District Court were not clearly erroneous.

4. The decision of the Circuit Court of Appeals modifies, overrules or ignores the findings of fact of the District Court despite the fact that the findings of the District Court are based on substantial evidence and upon the oral testimony of the witnesses which the trial judge had an opportunity to hear. This is in direct conflict with the opinions by this Court in *United States* v. *Jefferson Electric Manufacturing Co.*, 291 U. S. 386; *McCaughn* v. *Real Estate Land Title & Trust Co.*, 297 U. S. 606; *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251.

5. The Circuit Court of Appeals has now rendered a decision with respect to the weight to be accorded to the "Certificate of Service" and "Report of Separation" in determining the status of a member of the Army of the United States that is in apparent conflict with the opinion and policy expressed by this Court in *United States* v. *Kelly*, 82 U. S. 34; and with the District Court for the Southern Dis-

trict of New York in *United States ex rel. Santantonio* v. *Warden,* 265 Fed. 787.

6. A court martial having an unlimited power of sentence, its jurisdictional limitations which are affirmatively established by statute should be strictly construed to be limited to those persons who are clearly in a true active duty status and thus clearly under Army authority. Therefore, this case presents important questions of Federal law which should be settled by this Court.

Conclusion

WHEREFORE petitioner respectfully prays that a writ of certiorari may issue.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

I

District Court Findings

Findings of a District Court in a habeas corpus proceeding are binding upon a Circuit Court of Appeals unless, giving due regard to the opportunity of the trial court to judge the credibility of the witness, its finding is clearly erroneous. Albert ex rel. Buice v. Patterson, 155 F. (2) 429, 432. Cert. denied 329 U. S. 739; rehearing denied 329 U. S. 827.

The failure of the Appellate Court to give due effect to these findings is shown *infra,* Subdivisions IV and V.

II

An Officer Is Not Subject to "Recall" for Purposes of a Court-martial if in an Inactive Status

It is well settled that an officer in a reserve status or on inactive duty is not subject to jurisdiction of a court martial, with the exception of offenses under the 94th Article of War as to which jurisdiction is expressly retained by the statute and with which we are not here concerned. In his opinion in this case the District Judge said:

> "It was conceded by counsel for respondent, however, in the course of the trial, that an officer on inactive duty is not subject to the jurisdiction of a military court, nor can such officer be recalled to active duty for the sole purpose of court martial proceedings; and this concession is borne out by a ruling of the Judge Advocate General, February, 1946, at page 35. See also *United States ex rel. Viscardi v. MacDonald* (1920), 265 Fed. 695; *United States ex rel. Santantonio v. Warden or Keeper of Naval Prison in Navy Yard, Brooklyn, New York* (1919), 265 Fed. 787; CM 307101, *Allen;* CM 283459, *Reid;* CM 312219 *Murray.*" (R. 9)

In Bulletin of the Judge Advocate General of February, 1946, cited by the court above, it is stated:

> "Except as to offenses involving violations of Article of War 94, Court Martial jurisdiction ceases over military personnel upon honorable discharge or upon transfer to reserve components. In the case of officers of the Army of the United States such jurisdiction ceases upon being placed upon an inactive status. The mere preparation of charges against an officer of the United States prior to his being placed upon an inactive status would not be sufficient to continue court martial jurisdiction over him as to the offenses therein charged. SPJGA 1946/1791."

See also Bulletin of the Judge Advocate General for May, 1946, page 122.

Vol. 4, Bulletin of the Judge Advocate General, p. 339, CM 283459 (1945).

Paragraph 10 of the Manual of Courts-Martial U. S. A., provides:

> "10. Courts-Martial. Jurisdiction in General—Termination. *General Rule.* The general rule is that court-martial jurisdiction over officers, cadets, soldiers and others in the military service of the United States ceases on discharge or other separation from such service and that jurisdiction as to an offense committed during a period of service thus terminated is not revived by a reentry into the military service."

The Court may therefore assume as a premise to the consideration of this petition that an officer on an inactive duty status is not subject to trial by court martial for an offense committed prior to his being placed upon such an inactive status.

III

An Officer on Terminal Leave Is on a True Inactive Duty Status and Is Not Subject to Recall for Court-martial Proceedings.

As just shown, an officer on an inactive status is not subject to recall by the Army for the purpose of being tried by court martial on a charge alleged to have occurred prior to being placed on an inactive duty status. The respondent admits that such is the law and the District Court so held.

Petitioner here entered upon her terminal leave on March 9, 1946 and subsequently, beginning in August, 1946, was tried by court martial. The narrow question presented here is whether she was lawfully recalled after March 9, 1946 for the sole purpose of the court martial trial.

In truth and fact, as petitioner asserts and as the District Court found, terminal leave status is *inactive.*

An officer on terminal leave:

1. Has received final orders. They are self-executing and by the mere lapse of the stated period the officer is eliminated from the payroll of the Army. The Army is not required to, nor does it perform any further acts to make the orders effective. The officer is not required to do anything pursuant to such orders.

2. Has no duties to perform and is a free agent with respect to the Army. The Army does not expect to have any further contact with him.

3. Has no commanding officer to whom he must report either during leave or at its expiration.

4. May change his address, and need not remain at the address given upon going on terminal leave. There are no restrictions upon his travel movements, except possibly those applicable to civilians during wartime.

5. May seek and accept private employment, all the while drawing his Army pay until the expiration of his leave.

6. May accept employment with the Government despite the normal restrictions upon dual employment. Thus, at the same time he may be paid by two departments of the Government.

7. Need not wear the service uniform.

8. Is entitled to wear the Honorable Service Lapel button on his civilian clothes.

9. Receives one-third of his mustering-out pay when placed on terminal leave.

10. May be a candidate for, be elected to, and occupy public office and receive its emoluments.

11. Is not at present considered by statute as in active training or service nor as part of the armed strength.

12. Is given a personal identification card (AGO) perforated "INACTIVE" when placed on terminal leave.

As the District Court said:

> "* * * it is clear to me that for all practical purposes petitioner was separated from the active service in the Army when she left the separation center at Camp Beale. There remained no duty for her to perform, and everything which would ordinarily be expected to precede a separation had been done. She was kept in a technical 'active duty' status only that she might be kept on the Army payroll and paid for a period of accumulated leave." (R. p. 11)

This, it is submitted, is a sound and explicit conclusion as to the true status of terminal leave. The mere fact that the Army is paying the officer for past services rendered confers no control to recall for purposes of court martial when all other characteristics of a true active duty status are absent. No provision of law existed whereby the officer could have been paid in a lump sum. It is to be noted that by the subsequently passed Armed Forces Leave Act (Act of August 9, 1946, ch. 931; 60 stat. 963), the payment to officers and enlisted personnel of a lump sum for all accrued leave was authorized. This is clearly indicative of the fact that terminal leave was in effect a gratuity extended to officers in the absence of such an Act of Congress authorizing a lump sum payment. And the District Court in commenting on the absence of any permission to make lump sum payments said that had such provision existed in law, petitioner "would doubtless have been paid in full on the spot, and her certificate of service delivered to her then." Thus, the officer on terminal leave seems clearly to occupy the same position as an officer on an admittedly inactive status, and should not logically be subject to recall to answer any court martial charges.

The foregoing contentions seem clearly sound in the light of testimony before the District Court by Army officers and by Army administrative decisions.

Bulletin of the Judge Advocate General, Vol. 5, p. 106 (April, 1946).

Bulletin of the Judge Advocate General, Vol. 5, p. 25, (January, 1946).

From these decisions it is clear that permission was extended to officers on terminal leave to seek and accept private employment or employment in any other government department,—and that there had never been any prevailing intention to recall to active duty an officer on terminal leave—that the sole purpose of such terminal leave was to compensate the officer for accrued leave to his credit by placing him in a terminal leave status. Indeed, unless the officer was on what was termed an active duty status, there was no provision of law entitling him to payment. Bulletin of the Judge Advocate General, October, 1946, p. 8069.

Thus, there was a compelling necessity from a pay viewpoint for retaining the officer on a nominal active duty status. It may reasonably be concluded that the only purpose of the terminal leave status is to pay the officer for leave which he has earned before being placed on terminal leave. Otherwise as the District Court stated petitioner "would doubtless have been paid in full on the spot."

As we have said, the fact that an officer on terminal leave is free to go and come, move about freely, and change his address without notification to the Army is of striking significance in considering the true nature of terminal leave. The Army has promulgated no regulations whereby it concerns itself with the activities of the officer on terminal leave. In Bulletin of the Judge Advocate General Vol. 3, p. 73, an officer was granted terminal leave effective

December 18, 1943, and was directed to proceed home, to arrive not later than March 3, 1944. It was there held:

> "There is no legal objection to the officer proceeding to Puerto Rico prior to 3 March 1944. The restriction in travel by officers on leave of absence contained in paragraphs 6 and 19 A. R. 605-115, 14 July 1942, relate to travel to a foreign country. The direction contained in the orders relative to proceeding to his home are for the purpose of authorizing mileage allowances and transportation of dependents at Government expense and formally terminating his active duty status. They were not intended to restrict his actions while on terminal leave nor would the failure of the officer to return home be considered a violation of his orders."

From this opinion it is apparent that the Army never proposed to create a condition or status whereby an officer on terminal leave could effectively be recalled to perform active duties. Surely if the Army promulgates no regulations to keep itself informed as to the correct address of the officer, and there is no correlative duty on the officer to so inform the Army (and if terminal leave can be revoked, such orders must be received by the officer concerned—see Point IV, *infra*), clearly then, there exists no certain procedure whereby the officer can be recalled. Thus, if the certainty of recall is absent, surely no active duty status can be present.

Title 38 U. S. C. A., Sec. 691a (a) provides,

> "* * * each member of the armed forces who shall have been engaged in active service in the present war, and who is discharged or relieved from active service under honorable conditions on or after December 7, 1941, shall be eligible to receive mustering out payment."

The same statute in Section 691b(b) provides that such payments shall be made to the person eligible by paying

one-third of the stipulated amount at the time of final discharge (enlisted personnel) or "*ultimate relief from active service*" (officers). Here petitioner received the first installment of her mustering-out pay on March 9, 1946 to which she was *only* eligible *upon ultimate relief from active service.* The District Court considered this a most persuasive argument in determining that terminal leave was in truth an inactive status and said:

> "Petitioner was not entitled to any part of her mustering out pay until she was ultimately relieved from active service. The fact that she received the first installment on March 9, 1946, is convincing evidence that the terminal leave orders were regarded as relieving her, for practical purposes, from active duty. The fact that after her arrest she repaid the $100 of mustering out pay, at the request of the finance department of the army, cannot alter the effect of its having been paid to her on March 9, 1946." (R. 11)

Although Army Regulations 605-115, before they were amended and abolished terminal leave by name, did state that an officer on terminal leave is on an active duty status until the expiration of such leave, they nevertheless provided as follows:

> "15. Definition. a. Terminal leave is an administrative term applied to leave granted an officer immediately prior to separation from active service."

Sub-paragraph C, however, quite significantly stated:

> "The last day of terminal leave is the last day of duty (*pay status*) and the date on which (at 2400 hours) the orders for relief from active service become effective." (Italics supplied.)

Thus, these regulations recognize as the District Court said "that retention of an officer on terminal leave in active duty status is for the purpose of paying him compensation, which otherwise could not be done." (R. 10)

Identification Card

Certainly, however, one of the most convincing acts of the Army with respect to the character of terminal leave is the processing of the personal identification card of the officer when placed on terminal leave. This personal identification card (AGO card) is the most important document showing his true status to the world (R. 342). This card was given to petitioner when she became an officer in the Army and contains her Army number and photograph. Thereafter when petitioner was placed on terminal leave, this card was officially and formally perforated "INACTIVE" and redelivered to her upon executing the terminal leave papers (R. 334-35).

War Department Circular 336, 1945, which governs the use and disposition of these identification cards provides:

> "I 5e. *Retirement, relief from active duty and separation.* Identification cards of commissioned, warrant, and flight officers (both male and female) (collectively referred to below as officers) will be disposed of *upon separation or relief from active duty* as follows:
>
> "I 5e (2) *Others*: Identification cards of officers not members of the Regular Army, *in cases of separation from the service or relief from active duty* under honorable conditions, *will be stamped* 'INACTIVE' with a perforating machine and returned to the officer directly from the station performing the perforation. • • •" (Italics supplied.)

Thus in case of officers not members of the Regular Army (for example petitioner as a member of the AUS), such identification cards UPON separation from the service or relief from active duty, "will be stamped 'INACTIVE.'" The Army by its own regulation has thus restricted itself as to the "*time when*" these cards may be stamped "INACTIVE" and that is *only in the case of separation or relief from active duty.* By no logic can the Army now impeach its own

official regulation. The explanation of the Army that the perforation of the card "INACTIVE", was to save the officer a return trip to the separation center upon the expiration of his terminal leave is without support in any Army Regulation. When stamped "INACTIVE" there is no accompanying prohibition whatsoever against the officer displaying the "INACTIVE" card to all the world.

The telegram of the Adjutant General sent to petitioner on May 24, 1946 clearly indicates the Army's own opinion at that time as to the inherent nature of terminal leave. In this telegram the Adjutant General used explicitly the phrase "recalling you to active duty" and attempted to assign petitioner to the receiving station at Fort Sheridan, Illinois (R. 286). To minimize the importance of these words it has been argued by the respondent that this was mere "inartful phrasing." But these words were used by The Adjutant General of the United States Army in his official capacity; and in view of his position of authority, his determination of the petitioner's status must carry great weight. Thus, if petitioner had been on active duty while on terminal leave, there would have been no point whatsoever in recalling petitioner to the same status in which she was at the time.

Further support, if necessary, is lent to this view by the testimony of Lieutenant Banfill, an officer in the office of The Adjutant General, who testified that her unit was concerned solely with recalling officers on terminal leave to "Active service."

> "Q. Had you ever recalled anybody on terminal leave before?
>
> A. Yes, sir, that was my job.
>
> Q. To recall them to active duty from terminal leave?
>
> A. Yes, sir" (R. 325).

Thus the army officer most intimately concerned with the recall of such officers testified that officers on terminal leave

are *recalled to active duty.* The District Court stated as follows with respect to these considerations:

> "The use of these words (recalling to active duty in the telegram of May 24, 1946) followed by Lieutenant Banfill's testimony on the stand indubitably shows that she, at least, acting for the Adjutant General, regarded terminal leave as inactive duty, and that this idea was so far shared by her superior officers that a section was set up in the Adjutant General's office which was known as the 'Recall to Active Duty' section and was concerned solely with recalling to active duty officers on terminal leave" (R. 12).

Petitioner submits that certain available statutory benefits or perquisites such as hospital benefits, medical treatment, etc., if indeed applicable to a terminal leave status, fall within the same class as PAY itself during terminal leave. If compensation can only be made for accrued leave while the officer is on a nominal active duty status, such other benefits likewise could only be made available in the same circumstances.

The foregoing contentions by petitioner as to the true nature of terminal leave are not mere assertions but are supported by the report of the Senate Committee on Military Affairs (Senate Report No. 1704, July 11, 1946—79th Congress, 2nd Session, 1946, U. S. Code Congressional Service 1946, page 1342) on the Armed Forces Leave Act of 1946—the same Act cited by respondent in support of her contention—where it is stated:

> "It *has been* the policy of both the War and Navy Departments to permit officers to take advantage of accumulated leave upon relief from active duty. This means that an officer, *although for practical purposes relieved from active duty, actually remains upon the Government pay roll for a period of time equivalent to the amount of leave that has accumulated to his credit.*" (Italics supplied.)

The pertinent facts as marshalled by Judge Moore of the District Court are thoroughly convincing that petitioner was placed on an inactive status when she entered upon terminal leave:

> "Petitioner was sent to Camp Beale for separation from the service. It was a separation center. She was given lectures to prepare her for civilian life. One-third of her mustering out pay was delivered to her. A certificate of service, effective May 30, 1946, was filled out and signed by her, and by the chief of officer's affairs (possibly by the executive officer as well). Her identification card was perforated with the word 'Inactive.' She was given an 'Honorable Service' lapel button. An order was delivered to her which said in effect 'you are placed on terminal leave expiring on May 30, 1946. You may go home or elsewhere. You need not report hereafter to any superior authority. You are relieved from active duty, effective on the date your terminal leave expires' " (R. 10).

Surely no more convincing facts could have been found to support petitioner's contention that in truth and fact terminal leave is an inactive duty status.

IV

Petitioner's Leave Orders Were Never Effectively Revoked and her Terminal Leave was not Effectively Terminated Prior to May 30, 1946.

Were petitioner's terminal leave orders effectively revoked and the unexpired portion of her terminal leave effectively cancelled, or did they remain in effect and by their self-executing terms release her from active duty on May 30, 1946?

This is a vital point upon which the findings of District Court and the opinion of the Circuit Court of Appeals, arrived at by a disregard of those findings, radically disagree.

The District Court found and stated:

> "It is necessary in this connection to consider the effect of the telegram received by petitioner on May 29, 1946. It must be borne in mind that petitioner, on April 9, 1946, had made a personal request to be returned to active duty in the European Theater, and had been told that if any opening occurred she would be advised. On receipt of the telegram it is evident that she thought, as she naturally would think, and as she testified that she did think, that it was the result of her previous application. No mention is made in the telegram of any revocation of terminal leave. The most that can be said of the effect of this telegram is that it gave petitioner notice that the Army was now willing to comply with her request made on April 9, 1946, and that orders to that effect were being mailed to her. She had no reason to believe that the orders would be enforced against her will.
>
> "Petitioner never received these orders prior to May 30, 1946" (R. 12, 13).
>
> "• • • It is my conclusion that petitioner's terminal leave orders were never effectively revoked, and that by their self-executing provisions she was finally and formally separated from the service on May 30, 1946" (R. 12-13).
>
> "Petitioner did not receive any copy of these orders prior to her arrest" (June 3, 1946) (R.4).

The Circuit Court of Appeals did not give effect to this finding. It was cast aside with the following statement in the opinion:

> "First of all, there is the fragile contention that the order of May 24, 1946, revoking the terminal leave, did not become effective because it was not delivered to the petitioner before May 30, 1946, when the leave expired, and hence she was out of the Army before the prosecution began and the jurisdiction of the court-martial could attach. It was proved, however, that the petitioner received telegraphic notice of the order of

> revocation in time, for on May 29, prior to the expiration of her terminal leave on May 30, she responded by wire stating that she did not desire further active duty. It is true that the telegram from the War Department spoke inaccurately of orders "recalling" the petitioner "to active duty" rather than of orders revoking the terminal leave; but it is obvious that the telegram could not affect the true nature of the active status which, according to customary practice, she retained during her terminal leave. The order actually issued by the Adjutant General, as distinguished from the telegram, was of course controlling. (It expressly revoked so much of the order of March 9 that stated that the officer should revert to inactive status on May 30, 1946), and the petitioner's answering telegram showed clearly that she was under no misconception as to the nature of her orders." (R. 384)

How far from "fragile" the District Court's finding was—on the contrary how soundly based and how well supported by substantial evidence it was—can readily and conclusively be shown.

The petitioner received the telegram of May 24 on her return to Hudson, Wisconsin, on May 29, and, thinking the "recalling you to active duty" found therein referred to her voluntary application made the previous month and then pending, to be recalled for active service abroad, she, on that day (May 29), wired the Fort Sheridan Reception Station that she did not desire further active duty, and on May 31 she again wired that she did not understand the recall to active duty and was now married and did not desire further active duty, and would appeal for her discharge to be effective.

She testified that she did not receive any letter revoking her terminal leave until after May 30, and did not see such orders nor any copy thereof until a month or two later when a copy was handed her by Colonel Pierce or Colonel Miller. (R. 274).

It was on such evidence as this, which was uncontradicted, that the District Court made its finding, set out above, that "Petitioner did not receive any copy of these orders prior to her arrest," June 3, 1946, (R. 4, 294) and that "Petitioner never received these orders prior to May 30, 1946." (R. 12, 13)

Orders of May 24 Must Be Rejected

Accepting, and being bound by, this finding of fact of the District Court, it follows necessarily that the said orders purportedly "being mailed" on May 24 to the petitioner must be wholly rejected, as having no effect whatsoever either toward revoking any provision of the petitioner's terminal leave orders or toward prematurely terminating her terminal leave. The crucial questions, (1) Whether the March 9, 1946, Special Orders 68 of Camp Beale were revoked as to the discharge therein granted to the petitioner, as automatically effective at the end of her leave, and (2) Whether the terminal leave therein granted to her was cut short and terminated prior to May 30, 1946, the stated date of its expiration, are thus left dependent solely upon the effect of the War Department's telegram of May 24, 1946, as received by the petitioner on May 29, 1946.

Instead of accepting the District Court's finding of fact that the petitioner never received the orders of May 24, 1946, and did not receive any copy of the said orders prior to June 3, and holding as a consequence that the terminal leave of the petitioner ran to its natural end on May 30, whereupon she was separated from the Army, the Circuit Court of Appeals committed the grave and prejudicial error of assimiliating the orders with the telegram and holding that the telegram of May 24 (received) was notice to the petitioner of the contents of the purported orders (not received), and, in face of the fact that the District Court's

finding was directly to the contrary, the Circuit Court of Appeals held that the petitioner's telegram of May 29 to Fort Sheridan "showed clearly that she was under no misconception as to the nature of her orders."

Fallacy in Assimilation

In order to show a fatal fallacy in this assimilation of the orders and the telegram by the Circuit Court of Appeals, it is only necessary to set out the substance of the orders and of the telegram and to note their radical differences, as follows:

In the *orders of May 24,* we find the following:

> "1. * * * So much of paragraph 5, Special Orders 68, Hdq. Separation Center Camp Beale 9 March as pertains to Kathleen B. Nash states that subject officer will revert to inactive status on May 30 46, *is hereby revoked.*
>
> 2. The unexecuted portion of terminal leave granted Kathleen B. Nash by above mentioned special orders *is hereby terminated* effective 28 May 46.
>
> 3. Kathleen B. Nash * * * is relieved from assignment to Separation Center #42 Camp Beale, California, and is assigned to Reception Station #7, Fort Sheridan, Ill. She will proceed from Hudson, Wisconsin to station assigned, reporting on 29 May 1946."

The *telegram of May 24,* which the petitioner received on May 29, was as follows:

> "WD LTR orders being mailed today recalling you to active DY effective 29 May 46 and assigning you Reception Station Ft Sheridan, Ill * * *"

The notable differences between the orders and the telegram are that in the former the March 9 order under which the petitioner was to revert to inactive status on May 30 "is revoked," and the terminal leave granted the petitioner in

said March 9 order "is terminated"; while in the telegram there is *no revocation* of the March 9 orders and there is *no termination* of the terminal leave granted by said orders, nor is there any notice of such revocation and termination.

The telegram did not pretend to be an order in and of itself. The only thing it purported to do was to *inform* the petitioner that orders were "being mailed", or were to be mailed, that day, recalling her to active duty and assigning her to a new station. This was *far from revoking* the provision of the Camp Beale March 9 Special Orders relieving her from duty on May 30, and equally *far from terminating* the terminal leave granted to her in the said March 9 orders.

And special attention is called to the fact that the words of the telegram "recalling you to active duty," are later repudiated by the respondent as "inartful phrasing," which would leave the telegram as meaning nothing whatever except a notice of a change (or proposed change) in the station of the petitioner from Camp Beale to Fort Sheridan, effective May 29—such a change in station being altogether immaterial in the present connection. Neither would the telegram amount to anything more than notice of change of station even if the respondent were right in the contention that during her 81 days of terminal leave expiring May 30 the petitioner was on active duty; for certainly *if she were already on active duty she could not be "recalled" to active duty,* and on that point the telegram would be completely meaningless and could have no effect as informing her of any change in her leave status.

That, to have practical effect, there was imperative necessity for being specific and definite in such a matter could hardly have been more apparent to anyone than to the War Department itself; for, when the Department came to drafting the orders to the petitioner supposed to be mailed that day, it devoted the whole of a separately numbered paragraph to the *revoking* of that portion of the petitioner's

prior terminal leave orders which relieved her from duty at the expiration of her leave, and devoted the whole of another separately numbered paragraph to the *terminating* of the unexpired portion of the leave granted her in the said prior orders. The Department did not content itself with merely using the expression "recalling you to active duty" —whatever that "inartful phrasing" might mean or not mean as applied to the petitioner's situation.

Orders Become Effective Only Upon Receipt or Adequate Notice

Entirely irrespective of the form or substance of military orders, however, it is well settled that special orders are binding and effective upon the officer concerned only if and when delivered or made known to him. If telegraphic notice is relied on to take the place of actual receipt of orders, such notice must be specific and adequate, stating the substance of the orders.

In Board of Review cases CM 211586 May 10, 1939, Volume 10, page 107, it was held that special orders are binding upon the person concerned only if delivered or made known to him. See also Dig. Op. JAG 1912-30 Supp. VII Sec. 47(2).

The respondent conceded this principle. (R. 13).

In JAG Op. 30 and JAG 326.03 March 1934, orders were issued August 24, 1933 relieving a lieutenant from active duty to enable him to arrive at his home on August 26, 1933, upon which date he was to revert to inactive status. Orders were not received until August 29, 1933, after which he immediately left for his home, arriving August 30. The Board said:

> "The War Department has consistently held that such orders as those described above, individual in their operation and requiring action on the part of the person affected, do not take effect until the person

affected thereby receives actual or constructive notice thereof. (See Dig. Op. JAG 1912, page 276, Ed. 1924, p. 6.) In view of this it appears without question that irrespective of the date of ruling specified in the order of August 24, the order legally provided that he would be relieved from active duty on August 26, if given timely notice of the contents of the order, otherwise he would be relieved when the order was communicated to him and completed the action required thereby. Under the circumstances disclosed by the correspondence it must be held that Lieutenant Para was legally on active duty until August 30, 1933."

See also Bulletin of the Judge Advocate General, Vol. 3, page 449, 1944 ;

Bulletin of the Judge Advocate General, Vol. 4, page 456.

It is here assumed that orders to the petitioner to effect such revocation and termination were prepared in the War Department on May 24, the date of the telegram to the petitioner. But whether such orders were issued and mailed out by the War Department to the petitioner on or anywhere near their purported date is highly problematical. No proof was offered by the respondent on that point beyond testimony that such orders were placed where they should have been mailed; and, although the orders of purported date May 24 bore notation for them to go to six different distributees, five of which were Army commands and the sixth the petitioner, not one is shown to have received them. If they were received by any of those five Army commands, it would seem a very easy matter for the respondent to show it, together with the date of receipt as stamped at the time on each such incoming paper. The fact that no such showing is made only adds to the doubt whether the orders in question left the War Department in time to become effective before May 30. And, if it were assumed that they were promptly mailed, there would still be grave doubt, as

herein later shown, whether they were mailed to the correct address of the petitioner.

Fact Is Certain That Petitioner Did Not Receive Orders Until After May 30

The important point in this connection, however, is clear, fixed and definite, and this is that the petitioner herself, the officer to be affected thereby, *did not receive such orders until after May 30*—too late to have effect upon a status that had ended May 30. She testified to this in positive terms, and the District Court believed her and found as a fact that she did not receive the said orders until after May 30 and did not receive a copy of such orders until after her arrest on June 3, a finding which should have been binding on the Circuit Court of Appeals, but which that Court seemed not to accept, as it dismissed the point with the curt remark "at the hearing she denied that she received them."

If she had received the May 24 orders revoking her leave orders and terminating her unexpired leave, as well as changing her station, she could hardly have telegraphed from Hudson, Wisconsin, to Fort Sheridan, Illinois, on May 29, the moment she received the telegram of May 24, saying she did not desire further active duty; nor on May 31 (not having received an answer from Fort Sheridan) could she have telegraphed again, telling Fort Sheridan she did not understand the War Department's telegram but after having applied for duty abroad she had married and now did not desire further duty, nor could she have called Fort Sheridan by telephone on June 2 and again tried to get and give information. Very evidently, she considered the Department telegram, emanating from the source which had received her application, as an answer to that application, and thought that any question of further service was a matter within her own control.

District Court's Conclusive Finding

The District Court took into consideration the petitioner's uncontradicted testimony as to her application of April, 1946, for active service abroad, and as to her having been promised that if an opening occurred such application would be considered, and her telegrams to Fort Sheridan of May 29 and May 31, and found as a fact that the petitioner thought the War Department's telegram of May 24 had reference to her voluntary application and that her telegram of May 29 was sent under this impression. The Circuit Court of Appeals should have been bound by this finding of fact and should not have held that the petitioner's telegram of May 29 "showed clearly that she was under no misconception as to the nature of her orders."

The uncontradicted testimony of the petitioner goes even further than above indicated, and shows that she *never* received the original orders of May 24, and that she did not see any copy of such orders until a month or two later when she was shown a copy by Colonel Miller or by Colonel Pierce, both officers from the Provost Marshal's office. From this testimony and from the fact that the respondent failed to show the receipt of such orders by any one of the five other proposed distributees of those orders, it seems a fair inference that they never were mailed.

Necessary Results From Evidence and Findings

From the foregoing, it is confidently asserted that the telegram of May 24, 1946, did not accomplish its only proper function, to inform the petitioner of the substance of the prepared orders. This is amply and conclusively shown both in the internal evidence of the contrasted telegram and orders and in the effect of the telegram upon the petitioner, as found by the District Court. And the Circuit Court of Appeals was plainly in error in not accepting one or the other (or both) of these demonstrations and findings as a

basis for a conclusion that the petitioner was separated from the Army on May 30, 1946.

It cannot be gainsaid that, as found in fact by the District Court, (1) petitioner did not receive the orders of May 24, 1946, nor any copy thereof, and (2) the petitioner was not informed of the substance of the said orders by the telegram she did receive. This being true, necessarily she was separated from the Army on May 30, 1946, before effective action was taken against her.

Inferences from Respondent's Exhibits Made on Motion for New Trial

If the Court considers for any purpose the record of the motion for new trial in this case, it is worthy of notice that at the hearing on that motion the respondent produced for the first time two telegrams, though not claiming that such telegrams constituted newly discovered evidence and not claiming that they constituted any sort of notice to petitioner. The first of these telegrams was dated May 24, 1946, and was from the War Department to Camp Beale, California, and read as follows:

> "WD LTR ORDERS ISSUED 24 MAY 46 REVOKING TERMINAL LV GRANTED CAPT KATHLEEN B NASH L918024 WAC BY PAR 5 SO 68 9 NAR 46 EFFECTIVE 28 MAY 46 PD OFF ASGD REC STA #7 FT SHERIDAN ILL PD EDCMR 29 MAY 46 PD HOME ADDRESS 1409 THIRD ST FT SHERIDAN ILL PD BY ORDER SW CITE IN REPLY SPCPO-A-C.
>
> WITSELL, Tag." (R. 110.)

The second of these telegrams was also dated May 24, 1946, and was from Camp Beale, California, addressed to the petitioner at 1409 Third Street, *Fort Sheridan, Illinois*, and read as follows:

> "YOUR TERMINAL LEAVE IS TERMINATED 28 MAY 46 YOU ARE RETAINED ON ACTIVE DUTY AND WILL REPORT TO REC STA NO & FT SHERIDAN ILL EDCMR 29 MAY 46 ACKNOWLEDGE IMMEDIATELY END CBPC-SC-OB OFFICIAL.
>
> DANIEL J. MURPHY,
> *1st Lt., CWS, Asst. Adjutant.*" (R. 108.)

It is also to be noticed that the War Department had in its files the correct permanent address of the petitioner, namely 1409 Third Street, *Hudson, Wisconsin,* and used that correct address in wiring her on May 24, 1946, as above shown and discussed; but that, nevertheless, in its telegram to Camp Beale, above quoted, at practically the same moment of the same day, it made the flagrant mistake of giving Camp Beale the petitioner's address as 1409 Third Street, *Fort Sheridan, Illinois.*

Upon its receipt of the Department's telegram Camp Beale apparently, and naturally, repeated the Department's error in addressing its telegram, above quoted, to the petitioner, at 1409 3rd Street, Fort Sheridan, Ill. There is no claim that the petitioner received the Camp Beale telegram, and, of course, with such an impossible address, it could not have reached her.

The suggestion is ventured that the two telegrams furnish a clue to the mystery why the purported War Department orders of May 24, 1946, were not received by the petitioner or by the proposed distributees thereof—the solution being that the said orders were not mailed out by the War Department.

The explanation seems to be this: The ordinary routine in military procedure for delivery of orders to an officer attached to a particular station is not for the War Department itself to issue orders directly to the officer but for it to leave such orders to be delivered by the officer's station. Here, the Department may have intended when it wrote its telegram to the petitioner to issue its orders directly to her, but it may have decided later to let the matter go through routine channels and not to send out the orders it had prepared.

Otherwise, why should the Department wire Camp Beale and why should an address for the petitioner be inserted, and why should Camp Beale undertake to wire the petitioner on the same day?

Another question that might be asked is, may not the War Department, if it actually sent out the said orders, have addressed the enclosing envelope to the petitioner at the same false address that it, on the same day, gave to Camp Beale?

And, as a final question, it might be asked: Was not the War Department on May 24, 1946, intent upon letting others know that the orders comprehending the petitioner's separation from the Army had been revoked and her leave terminated; but also intent upon keeping from her such facts about her status?

V

The Circuit Court of Appeals failed to follow the findings of the District Court with respect to the Certificate of Service.

The District Court stated:

> "I am further of the opinion that the certificate of service which she later received, like an honorable discharge in cases of enlisted personnel, is a formal and solemn act on the part of the Adjutant General of the Army, which, in the absence of a showing that it was issued through mistake or by an unauthorized person, cannot be impeached. There is no such showing in this case. 'See United States *v.* Kelly, 82 U. S. 34, 21 L. Ed. 106.' "

The Court of Appeals held "There is abundance of evidence to show that the certificate was forwarded to petitioner by mistake."

The Circuit Court of Appeals in arriving at this finding, that there was "abundance of evidence to show" the mistake, directly contradicted the finding of fact of the District Court that "there is no such showing in this case"; and the Circuit Court of Appeals referred to no basic facts to

support its conclusion but merely recited the general circumstances relative to her arrest, the purported revocation of her leave, and the claimed notoriety thereof, and did not touch the specific and crucial question whether the authorized officer, Captain Crosthwaite, issued the certificate under any mistake of fact as to what he was doing. The Circuit Court of Appeals in its conclusion but confuses its own idea of what the Army should have done with the fact of what Captain Crosthwaite actually did and without mistake knew he was doing.

Thus the Circuit Court of Appeals without hearing the evidence has substituted its own finding for the finding of the District Court in holding that *it did not believe* that the certificate was issued intentionally, when there was not a scintilla of evidence to show that issuance was a mistake. Petitioner submits that an appellate court cannot lawfully fail to accept such a finding on account of a mere belief that a certain act was performed inadvisably.

VI

70th Article of War

Petitioner urged in the Court below that there had been a manifest failure to comply with the provisions of the 70th Article of War and that compliance was mandatory and jurisdictional. U. S. C. A. Title 10, Sec. 1542; *Reilly* v. *Pescor*, 156 F. (2d) 632 (C. C. A. 8) (1946); *U. S.* v. *Bayer*, 156 F. (2d) 964 (C. C. A. 2) (1946); (reversed on other grounds) — U.S. —, 91 L. Ed. 1294 (1947); *Hicks* v. *Hiatt*, 64 F. Supp. 238, D. C. Pa.; *Anthony* v. *Hunter*, 71 F. Supp. 823, D. C. Kansas (1947).

However, the District Court found in respect of the November 1946 charges that "there was no substantial failure to comply with the requirements of Article of War 70" (R. 7, 8) and petitioner is bound by this finding just as

respondent is bound by its finding on revocation of terminal leave orders (R. 12-13).

It is clear however that *no* investigation was ever made pursuant to the 70th Article of War upon the charges filed against petitioner in Washington, D. C., on June 8, 1946 (R. 30) notwithstanding the fact that demand was made on June 16, 1946 by petitioner through counsel for such investigation (R. 40). And so far as petitioner knows, such charges may *still* be pending (R. 5).

This not only violated the provisions of Article of War 70 but constituted a want of due process of law, as hereinafter set forth in subdivision VII.

VII

Want of Due Process of Law

Petitioner also contended in the District Court that the proceedings against her involving her arrest, detention, and the abstraction of a confession from her were in such flagrant disregard of her fundamental rights as to constitute a want of due process within the meaning of the Fifth Amendment to the Constitution (R. 25).

The District Court declined to permit the taking of any testimony on this point (R. 301-303).

Petitioner was thus precluded from adducing any *additional* evidence on this issue, and therefore on this petition she can have recourse only to the evidence adduced in the Court Martial proceedings. It is her contention here that nonetheless the facts which were *admitted* and *uncontroverted* even in the Court Martial record fully establish a situation "so inherently coercive that its very existence is irreconcilable with possession of mental freedom", (*Ashcraft* v. *Tennessee*, 322 U. S. 143, 154, 88 L. Ed. 1192, 1199 (1944)), and that they compel recognition of her deprivation of due process of law.

The fact that she was in the hands of the Military forces and not the Civilian police—the fact that she was tried by a Court Martial—gave no more sanctity for the invasion of her inviolable constitutional rights than would have been possible in any non-military proceeding.

The earlier concept of the use of the writ of *habeas corpus* was exceedingly narrow. This Court has radically broadened its scope. See cases *infra*, p. 41.

Whatever may have been the former rule, it is now clear that if due process has not been afforded by military proceedings, the accused may be set at liberty by the writ of *habeas corpus*—despite the rulings of the Court Martial and the failure of the reviewing authority to award a new trial. (Footnote to the opinion of Circuit Court Judge Biggs in *Hicks* v. *Hiatt*, 64 F. Supp. 238, D. C. Pa.)

See *United States* v. *Hiatt*, 141 F. (2d) 664, 666 (C. C. A. 3) (1944);

Schita v. *King*, 133 F. (2d) 283 (C. C. A. 8), (1943).

Shapiro v. *U. S.*, 69 F. Supp. 205 (1947);

cf. *Anthony* v. *Hunter*, 71 F. Supp. 823, D. C. Kansas (1947).

The Judge Advocate General of the Army has similarly held that guarantees of due process apply to military tribunals. November-December 1946 Bulletin, Volume 5, No. 9, p. 333.

The Confession

The confession was obtained under circumstances which violated the due process clause of the Fifth Amendment. The petitioner was taken into custody at 2:30 a. m. on June 3rd in Chicago, Illinois, by Military Police. She was immediately finger-printed and then rushed to Fort Sheridan, near Chicago about 4:00 a. m. Thereafter at 7 a. m. she was returned to Chicago without food or any sleep. In Chicago she was taken to the office of a private investigator,

one Keeler, where it appears she was subjected to prolonged and continued interrogation in relays by the private detective or investigator and by Army officers of superior rank. She was subjected to a lie detector test, recording devices, and other secret paraphernalia, which were in constant use in the office of the investigator (R. 176-177). Throughout this period of interrogation which was not terminated until the petitioner made her first alleged confession in the early afternoon of June 3, the petitioner was allowed neither food nor rest (R. 177). She testified that she was not explicitly warned of her right to remain silent (Colonel Pierce denied this), but it is undisputed that the 24th Article of War was not read to her, and indeed the investigators, although they must have known what they were about to do, did not have available a copy of this important Article of War (R. 174). She did not have counsel or relatives or friends to advise her. She was informed by Major Salb (one of the officers of the Military Police in whose custody she was) that her arrest had caused her sister to suffer a nervous breakdown, and Major Salb was not recalled to deny this (R. 177). She was shuttled back and forth from Chicago to Fort Sheridan over a period of several days. The first night in which she was permitted to have any sleep, she was imprisoned in an insane or psychopathic ward at Fort Sheridan where she suffered the indignities of having to remain in an *open cell* without toilet facilities, and with male military policemen on guard. Her clothes and belongings were taken from her. She was given pajamas, robe and slippers, and by necessity had to undress in open view (R. 178). Thus she was treated in every respect as though she were an insane criminal. And this notwithstanding the fact that Keeler (the private investigator) and Colonel Pierce (Officer in Charge of her investigation) had testified that she was quiet, submissive

and cooperative on June 3, just before she was put in the insane cell (R. 176).

In this case there are two alleged confessions to be considered. The first was obtained the first day the petitioner was held in custody while the second was obtained several days later after petitioner was subjected to the indignities of the psychopathic cell and the other ill-treatment outlined above (R. 5). Petitioner submits that on the facts here both confessions whether taken together or separately must be considered involuntary.

This Court has repeatedly held that practices and procedures similar to those pointed out above amount to coercion or extortion and that the resultant confession is not the offspring of reasoned choice.

Ashcraft v. *Tennessee, supra;*
Lyons v. *Oklahoma,* 322 U. S. 596, 602, 88 Law Ed. 1481, 1486 (1944);
U. S. v. *Mitchell,* 332 U. S. 65, 67, 88 L. Ed. 1140, 1142 (1944);
cf. *Bram* v. *United States,* 168 U. S. 532, 42 L. Ed. 568 (1897).

In the present case every element surrounding the interrogation of petitioner establishes a typical case of psychological pressure. Here was a lone suspect against whom the full coercive force of the Army was brought to bear. Under such a situation the petitioner could not possibly have been in possession of mental freedom. The peculiar relationship of the examining Army authorities, two of whom were superior in rank to her, and the petitioner's thorough indoctrination into the Army system of discipline and control through rank alone, put her on unequal terms with her examiners and consequently her mental freedom was more easily destroyed.

Petitioner urges, therefore, that the basic guarantees of the Fifth Amendment have not been accorded petitioner; that the alleged confession cannot be used to convict by court martial and that the entire trial was a nullity. It is submitted that the *undisputed testimony alone* constitutes a clear case of coercion and extortion which is sufficient to support the claim of lack of due process.

The following testimony is uncontradicted: Petitioner was taken into custody in the early morning on June 3rd; she was finger-printed and interrogated at great length; she had no sleep; the 24th Article of War was unavailable; she was detained and held in a psychopathic ward (See Exhibits; Stipulations R. 66, 67, 68); she was also held for days without benefit of the counsel of either attorneys or friends, although she was permitted to see her husband on occasions and talk to him by telephone; her interrogators were her superiors in the Army; she was subjected to a lie detector test; she was subject to all the secret machinery and paraphernalia of crime detection; she was shuttled back and forth between Chicago and Fort Sheridan for days; and she was examined in relays by both the investigator, his staff, and also by the Army officers.

Moreover the employment of Keeler, the investigator appears to be in direct violation of a Federal statute (27 Stat. 572, 591), 5 U. S. C. A. 53, which provides as follows:

> "No employee of the Pinkerton Detective Agency, or similar agency, shall be employed in any Government service or by any officer of the District of Columbia."

In Digest of Opinions of the Judge Advocate General 1912-1940, the Judge Advocate General § 643, has held pursuant to this statute that if the Government desires to avail itself of the services of such men, it will have to engage them as employees of the Government, and not as employees of such detective bureau, and their connection

with the detective bureau will have to be severed before they can legally be engaged as employees of the Government.

It is submitted that these undisputed facts alone support the contention of a complete lack of compliance with the requirements of due process.

When a confession obtained under duress has been received it is more than substantial error and reversal should follow although other evidence of guilt might be taken to be clear.

Brown v. *Mississippi*, 297 U. S. 278; 80 L. Ed. 682 (1936);
Chambers v. *Florida*, 309 U. S. 227; 84 L. Ed. 716 (1940);
White v. *Texas*, 310 U. S. 530; 84 L. Ed. 1342 (1940);
Ward v. *Texas*, 316 U. S. 547; 86 L. Ed. 1663 (1942);
Ashcraft v. *Tennessee*, 322 U. S. 143; 88 L. Ed. 1192 (1944);
Malinski v. *New York*, 324 U. S. 401; 89 L. Ed. 1029 (1945);
Haley v. *Ohio*, #51 Oct. Term 1947—decided Jan. 12, 1948; 92 L. Ed. (adv. sheets) 239;
Lee v. *Mississippi*, #91 Oct. Term 1947—decided Jan. 19, 1948; 92 L. Ed. (adv. sheets) 315.

It is true that the admissibility of the confession was considered and ruled upon by the court martial—but so were the confessions in the *Chambers, Ashcraft* and other cases, *supra*, ruled upon by the State Courts.

It is true that this Court in *Collins* v. *McDonald*, 258 U. S. 416; 66 L. Ed. 692 (1922), said that "an *allegation* of involuntary confession *unsupported* by reference to the record" shows at most an error in the admission of testimony. But that was long before the decision of this court in *Chambers, Lyons, Ashcraft, Malinski* and *Haley* cases,

supra, and moreover did not involve any such questions as are involved in the foregoing cases and in this case concerning the *treatment* of the accused.

Other Violations of Due Process

Petitioner after being taken into custody was also formally charged with the crime in question on June 8, 1946. No investigation of these charges under Article of War 70 was ever made despite the request of petitioner. These charges may still be pending; apparently they have never been dismissed (R. 5). On August 8, 1946, petitioner was again served with another set of charges on which she was subsequently tried by court martial (R. 116). It is submitted that it is a violation of due process under the broad rule established in the *McNabb* case, 318 U. S. 332; 87 L. Ed. 819 (1943), for Federal authorities to extort a confession from a suspect, charge this suspect formally with the commission of a crime, and then in effect to permit the charges to lapse, all the while holding the suspect in custody in Europe where a writ of habeas corpus will not run, *(McGowan* v. *Moody,* 22 App. D. C. 148), for the purpose of constructing another "case."

The use of a private investigator (Keeler) in violation of statute would clearly appear to be a further want of due process.

This procedure falls reasonably within the broad field of unfair practices denied validity recently by this Court in the cases cited above.

It is submitted, therefore, even apart from criticism urged with respect to the alleged confessions, that the entire procedure was so grossly in violation of due process that the court was without any jurisdiction whatsoever and that petitioner should be discharged.

As Mr. Justice Frankfurter in his concurring opinion in *Malinski* v. *New York,* 324 U. S. 401, 416, 89 L. Ed. 1029, 1039 (1945) has stated——

"The exact question is whether the criminal proceedings which resulted in his conviction deprived him of due process of law by which he was constitutionally entitled to have his guilt determined. Judicial review of that guarantee of the 14th amendment inescapably imposes upon this Court an exercise of judgment upon the *whole course* of the proceedings in order to ascertain whether they offend those canons of *decency* and *fairness* which express the notions of justice of English speaking peoples even toward those charged with the most heinous of offenses." (Italics added.)

VIII

Conclusion

It is therefore respectfully submitted that the writ of certiorari should issue.

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